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BEFORE THE
FEDERAL MARITIME COMMISSION

HANJIN SHIPPING CO., LTD.; KAWASAKI KISEN KAISHA LTD.; NIPPON YUSEN KAISHA; UNITED ARAB SHIPPING COMPANY (S.A.G.); and YANG MING MARINE TRANSPORT CORPORATION, Complainants, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Respondent.	Docket No. 11-12

MOTION FOR JUDGMENT THAT RESPONDENT'S CARGO FACILITY CHARGE VIOLATES 46 U.S.C. § 41102(c)

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I. INTRODUCTION

Complainants move the Presiding Officer to find that Respondent's Terminal Tariff (Section H) and its implementation, imposing on Complainants' vessels a "Container Facility Charge" ("CFC") for each loaded or discharged container or non-containerized cargo unit at the Port of New York and New Jersey, violates 46 U.S.C. § 41102(c).

The facts persuasive of this finding are simple and undisputed. The terms of Respondent's Tariff itself condemn the CFC, together with the facts that Complainants only receive container vessel services at the Port of New York and New Jersey ("Port") by contract exclusively with private terminals operating under leases from Respondent, and non-container vessel services from private stevedores. The Port's own statements then show the CFC is nothing but a vessel tax, severed from any benefit to the only interest paying it, vessel operators.

If the CFC could survive the internal flaws in the Port Tariff itself, the CFC would not survive under controlling precedents: The Port, as a marine terminal operator, violates 46 U.S.C. § 41102(c) by force-feeding a tariff charge to vessel operators and rendering no service in return for the charge, much less service reasonably commensurate with the charge. There must be a reasonable *quid pro quo*; a terminal tariff charge on vessels cannot be justified by theoretical analysis purporting to show that, over time, some untethered benefits may trickle down to vessel operators as one class in a universe of beneficiaries, while other classes pay nothing. The two-step analysis mandated by precedent regarding section 41102(c), determining the benefit, then determining if the benefit is reasonably related to the charge, cannot be implemented when there is no service which can be identified as rendered in return for a charge.

Complainants will not pursue violation of any provision of the Shipping Act of 1984, as amended, other than 46 U.S.C. §41102(c). It has become apparent it would be superfluous and duplicative to do so.

II. FACTS

A. Foundational Facts

The Parties

1. Complainants are ocean common carriers under the Shipping Act, 46 U.S.C. §§ 40102(6) and (17). *See* Statement of Facts Not in Dispute, ¶ 1. Each Complainant's container vessels regularly call at private terminals in the Port where they are furnished all services within the Port limits by those marine terminal operators at their leased facilities. *Id.* ¶¶ 3-4, 6-7. The Port is a public port only as to the Port's public marine terminals. Vehicle shipping and processing terminals are located at the Port's public berths where private stevedores service Complainant's roll-on/roll-off vessels. *Id.* ¶ 5. At public berths where two Complainants' non-container vessels berth, those vessels use no services furnished by, or participated in, by the Port in connection with loading, handling or discharging cargo. *Id.* ¶¶ 8, 10-12. The Port is a marine terminal operator within the meaning of the Shipping Act, 46 U.S.C. § 40102(14) (FMC Organization No. 002021). *Id.* ¶ 2.

The CFC

2. Section H of the Port Authority of New York and New Jersey's Tariff (FMC Schedule No. PA 10, effective February 2011, ("the Tariff") instituted the Cargo Facility Charge ("CFC") and contains the subrules for imposing and enforcing it. SUBRULE 34-1200 of Section H of the Port's Tariff applied the CFC, effective March 14, 2011, to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths. *Id* ¶¶ 13, 18-22.

3. The Tariff says the CFC "appl[ies] to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port Authority leased and public berths." Tariff, Section H, Subrule 34-1200. *See* Statement of Facts Not in Dispute, ¶ 19.

4. The Tariff announced a CFC of $4.95 per TEU of "container cargo." Tariff, Section H, Subrule 34-1210. The assessment, by the Port's description, is supposed to be against cargo in containers, but it is collected from the vessels for their container operations in the Port, whether or not cargo is involved. Non-container vessel operators are charged $1.11 per unit. *See* Statement of Facts Not in Dispute, ¶¶ 20-23.

5. The Tariff provides for the CFC to be assessed against each so-called terminal "user." *Id.* ¶ 24. In implementing the CFC, the Port implicitly reads "user" to mean any vessel calling at any terminal, leased or public, at the Port. *Id.* ¶¶ 25-26.

6. The Tariff provides, for the first time, a definition of "Port User" in Section H, Subrule 34-1220(1)(a): "'User' shall mean a user of cargo handling services." The Tariff does not define "cargo handling services." *See* Statement of Facts Not in Dispute, ¶ ¶ 24-25, 57.

7. Whether using the services of leased terminals or berthing at public terminals, all transiting vessels are held responsible by the Tariff for payment of the CFC. The CFC is charged against the handling by private entities of all containers and non-containerized cargoes on and off all carriers' vessels, including containers operated by vessel space charterers. Tariff, Section H, Subrule 34-1220(3)(a)(ii). *See* Statement of Facts Not in Dispute, ¶ 29.

8. Section H does not pretend the CFC is a charge in return for any service provided by the Port to container vessels or non-container vessels. *Id.* ¶ 37.

9. "Terminal operator" is recognized by the Tariff to be a "leased berth operator." Tariff, Section H, Subrule 34-1220. *See* Statement of Facts Not in Dispute, ¶ 27. The Port scheme was facially that the lessee terminal operator would collect the CFC from each container vessel operator and forward the payments to the Port. *Id.* ¶ 30. [redacted] REDACTED [redacted]d. ¶ 36. Certain container vessel operators actually pay the charge directly to the Port. *Id.* ¶ 31. Terminal operators must send a monthly Vessel Activity Report ("Report") to the Port

detailing all vessel activity at their terminals. The Report must identify container vessel operations from which the terminal operator did not receive the CFCs billed in Port invoices submitted to the vessel operator. Tariff, Section H, Subrule 34-1220(3)(b)(ii). *See* Statement of Facts Not in Dispute, ¶ 32.

Collecting From Vessel Operators by Blockade Threat

10. The Port announced enforcement for lack of compliance with the CFC and its supporting rules in Section H, beginning August 15, 2011. *Id.* ¶ 48.

11. The Port issues monthly invoices to each "user" of a leased terminal and to each "user" of a public berth. *Id.* ¶ 34. Invoices to those "users" of leased terminals are issued "c/o" the terminal based on the prior month's terminal Report. Tariff, Section H, Subrule 34-1220(3)(b)(i). *See* Statement of Facts Not in Dispute, ¶¶ 35-36. If a "user" does not pay the CFC for two consecutive Report periods, Section H directs the Port to require all terminal operators to cease service to all vessels whose operator did not pay the CFC and provides that the Port will issue a port-wide blockade order:

> ...the Port Authority shall issue a directive to every terminal operator prohibiting them from providing any service that would be subject to a Cargo Facility Charge to the delinquent user for a period from no later than 5 calendar days from the date of the directive until receipt of notice from the Port Authority that such unpaid Cargo Facility Charges have been paid

Tariff, Section H, Subrule 34-1220(3)(b)(iii). *See* Statement of Facts Not in Dispute, ¶ 37. This effectively blockades not only all that operator's vessels and appurtenant containers, but, as well, all the containers to be carried on that operator's vessels under space charters, and all that operator's containers in slots chartered on other operator's vessels. *See* Statement of Facts Not in Dispute, ¶¶ 39-40. So, the Port is closed to all these ships.

12. If a terminal operator continues serving a vessel despite a prohibition on service ordered by the Port, the port punishes that terminal operator by making it fully liable to the Port indefinitely for the CFC charges assessed against that vessel. Tariff,

Section H, Subrule 34-1220(3)(b)(iv). *See* Statement of Facts Not in Dispute, ¶ 41. This puts teeth into the blockade order.

13. Since March 14, 2011, each Complainant has been, and continues to be, invoiced for the CFC by the Port "c/o" container terminal operators. *Id.* ¶ 45. Each Complainant has been, and continues to be, invoiced for the CFC for containers listed in its bills of lading whether carried on its own vessels or on other carriers' vessels under space charter and handled at any Port terminal facility. Tariff, Section H, Subrule 34-1220(3)(a)(ii). *See* Statement of Facts Not in Dispute, ¶ 46. Each Complainant is forced by the blockade threat to then pay the CFC to the Port. *Id.* ¶¶ 47-54.

14. The CFC blockade threat applies to all space charterers on container vessels. If one signatory to a vessel-sharing agreement were ordered barred by the Port from all Port terminals, all other signatories would be punished. Tariff, Section H, Subrule 34-1220(3)(a)(ii). All vessels in that signatory's fleet would be barred, all containers of other signatories to cooperative arrangements would be barred, as would the fleets of other cooperating operators. This "scorched earth" threat of berth denial forces Complainants to pay the CFC or cease operations at the Port. *Id* ¶¶ 29, 38-42.

<u>The Lessee Container Terminals</u>

15. The lessee container terminals publish tariffs and assess tariff charges in accordance with their published tariffs, or in accordance with rates specified in contracts with Complainants whose vessels call at these leased terminals. Complainants have contracts with the lessee container terminals for all container services at the Port. *Id.* ¶¶ 7, 14-17, 55.

16. The Port has no contractual relationship with any Complainant whose vessels berth at leased terminals or public terminals. *Id.* ¶¶ 4-9.

17. The Terminal Agreements (FMC filed leases from the Port to the lessee MTOs) contain no provision that makes the Port's Tariff applicable to activities at the MTO's terminals. The Tariff excludes application of the Tariff, and its Rules and

Regulations, to any leased terminal unless the lease provides for it. Tariff Subrule 34-090, published February 2011, states:

> ...entry upon or into a terminal by any person shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations [of the Port]; provided, however, that unless provision is made in the lease for application of said Rules and Regulations to the leased premises, such Rules and Regulations shall not apply to such leased premises.

See Statement of Facts Not in Dispute, ¶¶ 59-62.

Public Berths

18. For their vessels' use of a public (non-leased) berth, the Tariff directs Complainants to pay the CFC directly to the Port. Tariff, Section H, Subrule 34-1220, 4. *See* Statement of Facts Not in Dispute, ¶¶ 19, 33. Private stevedores furnish all services to vessels at public berths. The Port provides no "cargo handling services" at public berths. *Id.* ¶¶ 5, 8, 12, 28-29.

Port Adoption of the CFC

19. The Port adopted the CFC in 2010 as a port-wide, supposedly "cargo-based" charge to be imposed on Complainants and other carriers. The Port supported its adoption, stating the goal of the CFC assessment on "cargoes," as follows:

> Increasing the operational efficiency for the movement of goods at the Port and throughout the region is a key strategic goal. To achieve that goal, the proposed Cargo Facility Charge would be assessed on all cargoes that benefit from capital investments in security, rail and road improvements. The proposed Cargo Facility Charge would be levied on all types of waterborne cargo moving through Port Authority marine terminal facilities — containers, vehicles, and bulk/breakbulk, general, heavy lift and special cargo.

See Statement of Facts Not in Dispute, ¶ 90.

20. The CFC levy on "waterborne cargo" was described in the Port Authority's December 7, 2010 Board Minutes ("Board Minutes"), p. 356, as:

> . . . a new Port Authority cargo-based port infrastructure and security fee, to be known as the Cargo Facility Charge, that will be applicable to waterborne cargo discharged from or loaded on to vessels at Port Authority leased and public berths. . .

Id. ¶ 90.

21. When the CFC was adopted, the Port painted this picture of imaginary "components" of the CFC:

> i. One component of the fee would recover capital expenditures incurred to construct our ExpressRail infrastructure. In addition to those who directly utilize the rail system, given the long-standing issues of road congestion in the Port, those who ship by truck have benefited from the investment in the ExpressRail system and continue to do so. Accordingly, it is fair and appropriate that they share in the cost of the investment in the ExpressRail system.
>
> ii. In 2004, an intermodal lift fee was implemented to recover the expenditures to date to construct Port-wide ExpressRail facilities. Rail cargo movements remove trucks from our terminals' gates and the Port's and region's highways, and benefit regional cargo with the increased roadway and gate capacity they provide. The ExpressRail System is an important link in the Port's logistics chain, the existence of which creates a more efficient transportation network for the transportation of containers while also mitigating negative environmental impacts to the region. Implementation of the Cargo Facility Charge (which includes the rail component) would eliminate the need for the Intermodal Container Lift Fee and be a broader and fairer assessment on the direct and indirect beneficiaries of the investment in ExpressRail.
>
> iii. As the agency continues to invest in the ExpressRail System, sufficient capacity on the Port's roadway system also must be provided, because the truck is, and will remain, the dominant mode of transport in the Port, due to the large local market we serve. The second component of the proposed Cargo Facility Charge would be charged proportionately to recover the cost of important Port roadway projects at Port Newark and the Elizabeth-Port Authority Marine Terminal (EPAMT), to reduce truck idling times and mitigate the attendant negative environmental impact caused by idling.
>
> iv. Under the third component of the Cargo Facility Charge, all cargoes would be charged proportionately for the partial recovery of the Port Authority's incremental post-9-11 security costs. …
>
> v. The security component of the fee may be adjusted in the future to reflect later investments of security-related capital costs.

Id. ¶ 90. Board Minutes, pp. 356-357. The CFC is portrayed falsely as a charge on cargo, not vessel operations, and the "components" are phantasmagoric. *Id.* ¶ 90.

22. Latterly, the Port faced the reality that carrier CFC payments "are not earmarked for particular expenditures." "The Port Authority of New York and New

Jersey's Objections and Responses to Complainant's First Request for Production of Documents," FMC Docket No. 11-12, Oct. 4, 2011, Document Requests Nos. 52 and 56, pp. 36 and 38. *See* Statement of Facts Not in Dispute, ¶ 91. So, the puffery has evanesced: the CFC proceeds go into general revenue.

B. The Substitution of the CFC Tax for the Rail User Fee

The Port's own words and its favored customers' show the CFC is a tax on vessel operators for facilities used by the universe of port customers.

<u>User Fees Considered</u>

23. **REDACTED** [redacted] *See* Statement of Facts Not in Dispute, ¶ 63.

24. **REDACTED** [redacted] That sound concept was destined not to be followed. *Id* ¶ 63.

<u>Complaint by a 500-Pound Gorilla</u>

25. REDACTED [redacted]

<u>The Port's Epiphany; Salvation in the CFC</u>

26. REDACTED [redacted]

27. REDACTED [redacted]

28. REDACTED [redacted]

REDACTED

[redacted]

29. REDACTED

[redacted]

30. REDACTED

[redacted]

[redacted]

Imaginary "Components" of the CFC

31. REDACTED [redacted]

32. REDACTED [redacted]

33. REDACTED [redacted]

See Statement of Facts Not in Dispute, ¶ 83.

34. A March 7, 2011 memo showed how the Port originally set up the CFC to [redacted]

35. [redacted] REDACTED [redacted] *Id.* ¶¶ 85-86. That this was a fiction was admitted in the course of discovery. *Id.* ¶ 91.

36. The Port has informed various vessel operators that they would be barred from container services in the Port if they did not pay outstanding CFC charges by August 15, 2011. *Id.* ¶¶ 50-54.

<u>**Angst Over User Fees**</u>

37. [redacted] REDACTED [redacted]

38. REDACTED [redacted]

C. The Winners and Losers Vessel Operators - By the Port's Calculations

We attach the Port's spreadsheet showing its portrayal of the winners and losers from the switch to the CFC. Complainants are featured losers under the new tax. *Id.* ¶ 89.

To avoid misunderstanding, we stress that all the foregoing utterances and other communications are presented not for the truth of statements therein (except for data), but for the undeniable facts that the statements therein were made in the documents disclosed to Complainants in the course of discovery and the data were compiled by the Port.

III. ARGUMENT

A. Summary

The CFC is a tax on vessel loading and discharging. The Port admits the proceeds are not funneled to support any identifiable services. The Port bills all container vessels \$4.95 per TEU, replacing a rail user fee of \$57.50 per load, using private terminals as mail drops for invoices. The Port will order the leased terminals to stop handling a non-paying operator's containers, blocking its vessels and other cooperating vessels from the Port. The Port bills non-container vessels directly, \$1.11 per cargo unit.

For purposes of this motion, Complainants can concede they would enjoy some benefit from expenditures which might be facilitated by Respondent's cancelling its rail user fee and collecting the CFC instead. Complainants are not going to argue the point, because it is not germane. Better roadways, improvements in intermodal rail, cleaner air, more port police, or even better on-time records at LaGuardia are good for various classes of beneficiaries. These improvements for the common good might more readily eventuate with an ever-escalating CFC tax in place of a rail user fee, if the CFC gives the Port more disposable income, but they carry no weight in measuring the CFC against section 41102(c). Respondent disclaimed in discovery any identifiable uses of CFC receipts. When a charge is not linked to a service, it is inherently impossible to measure benefit – it is a constantly moving target.

Some favorite vessel operators (e.g., CMA-CGM) enjoy a windfall from replacement of the use-based rail charges with the CFC (as the Port calculated), while others less important to the Port (e.g., Complainants) are penalized (as the Port calculated). Container operators might find their intermodal truck movements facilitated by road or bridge work (if that is how the proceeds are spent) or enhanced port security might benefit non-container operators in some amorphous way. None of this is significant under the protocol established by the courts and the Commission to measure the legality of terminal charges under section 41102(c).[1]

Respondent's original narrative created for the CFC was that its proceeds would fund amortization of Respondent's rail facility and certain other projects. Maybe they will, maybe they won't - as any other general revenue tax on vessel operations. The Port admits it displaced the rail user fee purely for Port competitive reasons, generating cash to plug holes in its balance sheet, to be used (and increased) at Respondent's whim. The Port admits, to protect its intermodal market share and favor certain vessel operators, it decided to replace cash flow from a rail facility user fee, the CRF, with cash flow from CFC proceeds. The port made no cost-benefit analysis when it established the CFC, nor could it have because the CFC has no link to services: the CFC does not pass muster under section 41102(c).

[1] 46 USC § 41102(c) states that a marine terminal operator "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." It is the recodification of section 10(d)(1) of the 1984 Act, 46. U.S.C. App 1709(d)(1), a standard carried forward from section 17 of the Shipping Act, 1916, 46 U.S.C. App. 816.

Respondent leases out all the container terminal facilities at the Port to the private terminals where Complainants' container vessel loading and discharging are performed. Respondent's Tariff (Section H)[2] charges the CFC only to vessels, but tries to camouflage it by making container terminals mail drops for the CFC invoices to the vessels. Encountering terminal resistance, Respondent switched in mid-stream from invoicing the terminals to the cosmetic ruse of invoicing the CFC to Complainants, "c/o" terminals.

Section H presumed to order the terminals to collect the CFCs billed by Respondent to Complainants and remit to Respondent the CFCs "collected from each user."[3] But, Complainants are not "users" (defined in the Tariff as "a user of cargo handling services"): their vessels use no cargo-handling services provided by Respondent. Lessee terminals are the only "users" of actual Port services, while container cargo and vessels merely transit the Port. Forcing non-user vessel operators to pay the CFC under the guise of a "user" fee is an unreasonable practice.

Section H says the CFC is charged "to all cargo containers . . . discharged from or loaded into vessels at Port Authority leased and public berths," but containers are (at least when owned/operated by vessel owners) legally appurtenances of the vessel, so the charge is to the vessel. Section H does not impose the CFC on cargo [4] or the terminals; it imposes the CFC exclusively on vessel activities of loading and discharging containers and non-containerized cargoes. That is an unjust and unreasonable practice under section 41102(c), closely analogous to the unconstitutionality of vessel tonnage taxes.

It is an unjust and unreasonable practice for a marine terminal operator tariff to impose a charge exclusively on vessels without giving any vessel service in return. Laid bare, the CFC is a pure tax. Complainants pay the tax whether their vessels load/discharge empty containers,[5] loaded containers or break-bulk cargo. Section H does

[2] Statement of Facts Not in Dispute ¶ 13.
[3] *Id.* ¶ 13 Tariff Subrule 34-1220(3)(b)(2).
[4] Respondent would charge a CFC to cargo under the pending NJ Senate Bill 2325, "Port Authority of New York and New Jersey Cargo Facility Charge Act," introduced November 19, 2012.
[5] A separate Motion for a Summary Judgment regarding charges on empty containers is pending.

not impose the CFC for services upon parties receiving the services. It is in no sense a user charge. It has no legs to leave the starting gate for the running of the two-part test of "benefits" and "reasonableness" under § 41102(c). It is a true "non-starter" under 41102(c).

Viewed another way, it is an unjust and unreasonable practice for Respondent's MTO Tariff to surcharge Complainants for cargo "handling" services furnished solely by private terminal operators. The CFC is a surcharge by Port fiat on Complainants' vessels transiting the Port. Respondent is extracting the CFC from Complainants just because it can - by using raw blockade power, abusing its dominant position.

There is no contract with vessel operators concerning the CFC implied by the Tariff's terms, and there is no express contract to support the CFC either, so Respondent has no legal basis for the CFC, thus no defense against the charge of unreasonable practice.

Using the blockade threat as a hammer to force payment of the CFC is an unjust and unreasonable practice standing alone. Forcing the CFC on Complainants on pain of the Section H blockade penalty, to be imposed both on the whole fleet of a non-paying operator and on its space charterers, is an extreme example of an unreasonable practice, which goes far beyond what is needed as a remedy for non-payment.

There can be no *bona fide* disagreement over the level of benefit accruing to Complainants from services in return for the CFC — there are no services in return. Instead of facing the inevitable defenses in collection actions for non-payment, Respondent uses its blockade threat against any "delinquent's" vessels and its shared vessels to bludgeon potential protesters into filling Respondent's coffers. Vessel operators pay millions in unlawful charges, while Respondent, admitting it could readily collect the monies lawfully from cargo interests, refuses to set up the mechanism to do so. This strong-arm scheme put the burden on Complainants to seek redress under the Act.[6]

B. The Port Tariff Does Not Apply to Activities at Leased Terminals

The first CFC flaw is Tariff inapplicability to activities at container terminals where Complainants' vessels are served. The Tariff is described on its cover page as "Naming Rules and Regulations Applying at Port Authority Marine Terminals and Rates and Charges Applicable for the Use of Public areas At Port Authority Marine Terminals". Tariff Subrule 34-090 requires compliance with the "Rules and Regulations" by anyone entering onto or using the Port's facilities. However, this Subrule includes an exception for leased premises. The Tariff states:

> Any permission granted by the Port Authority directly or indirectly, expressly or implication, to any person or persons to enter upon or use a terminal or any part thereof (including) watercraft operators, crew members and passengers, spectators, sightseers, pleasure and commercial vehicles, officers and employees of lessees and other persons occupying space at such terminal, persons doing business with the Port Authority, its lessees, sublessees and permitees, and all other persons whatsoever whether or not of the type indicated, is conditioned upon compliance with the Port Authority Rules and Regulations; and entry upon or into a terminal by any person shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations; <u>provided, however, that unless provision is made in the lease for application of said Rules and Regulations for leased premises, such Rules and Regulations shall not apply to such leased premises</u>. [Emphasis added.]

C. The Port Cannot Charge the CFC to Vessel Operators Under the Terms of Section H, Contract Law, or the Shipping Act.

Complainants are not obligated to pay the CFC under the terms of Section H set out above for two reasons: First, the Complainants are not "users" of the Port's cargo services in their containerized cargo operations or non-container operations. The Complainants are "users" of the leased terminal's services under contract with the leased

[6] Summary judgment is appropriate when pleadings and record demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" Fed. R. Civ P. 56(a) The administrative law judge must view the facts in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all justifiable inferences derived from the evidence in the record. *Anderson v Liberty Lobby, Inc*, 477 U S. 242, 249 (1986). A motion for summary judgment should be granted only when genuine disputes of material fact do not exist. *McKenna Trucking Co. Inc v A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1052 (1997).

terminal operators and "users" of private stevedore services for roll-on/roll-off operations. Second, the wording of Subrule 34-090 does not obligate vessel operators to pay the Port in "compliance with the Port Authority Rules and Regulations" because 34-090 by its terms does not apply to vessel operators' activities on leased premises.

The Port has a contractual relationship with the lessee terminal operators but no contract with Complainants. There is therefore no contract privity on which to make Section H apply to vessel operators. The Port, between Scylla and Charybdis, tries to slip through on the weak cosmetic ruse of invoicing through the MTOs.

Lastly, the Shipping Act and Commission regulations block the Port from collecting the CFC from vessel operators. Subrule 34-090 provides that any person's entry onto or use of Port terminals "shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations," which tracks the Shipping Act provision deeming an implied contract to exist between a tariff publishing MTO and its users. However, the Tariff, the Commission's regulations and the legislative History of the Ocean Shipping Reform Act of 1998 all preclude application of the published tariff to facilities covered by actual contractual relationships between an MTO (the Port) and its users (here, lessee terminals).

The Shipping Act precludes a Port Tariff provision (e.g. Subrule 34-090) that applies its published Tariff to premises under a lease contract when the lease does not specifically so provide. OSRA's legislative history, and the administration of OSRA by the Commission underscore this principle.

OSRA amended the Shipping Act of 1984, changing the manner in which marine terminal operators (including port authorities, such as PANYNJ) are regulated, particularly as to the terminal operators' application and enforcement of marine terminal tariffs or schedules.

Prior to OSRA, MTOs were required to file tariffs with the Commission.[7] OSRA eliminated mandatory tariff filing and gave MTOs alternatives: MTOs could make schedules of their rates, regulations and practices available to the public, or MTOs could opt not to make schedules publicly available. The immediate practical difference is that MTOs that make schedules publicly available and users of those MTO services automatically are bound by an implied contract that is enforceable in court, but not enforceable at the Commission.[8]

An MTO's published tariff ceases to be an implied contact with any particular user of MTO services if the MTO and user enter into a contract covering the services provided by the MTO to that user.[9] The MTO which binds a user by an actual contract has no authority to apply the tariff along with its contract. The purpose of the "implied contract" is to ensure that, absent an actual MTO/user contract, marine terminal operators are promptly and fairly compensated for the services they provide.[10] The presence of an actual contract serves that objective, and the addition of an implied contract would provide MTOs with no added protection, but only sow confusion as to the applicable governance of the MTO-user relationship.

The Senate report describes this situation fully:

> This section adds a provision to section 8 of the 1984 Act which will permit marine terminal operators to establish and make available to the public. . . a schedule of rates, regulations, and practices. . . pertaining to the receiving, delivering, handling or storing of property on the marine terminal. . . . Such schedules shall be enforceable by an appropriate court, not by the FMC, as an implied contract, without proof of actual knowledge of its provisions. If a marine terminal operator has an actual contract with a person covering the services rendered, such a schedule would not be enforceable as an implied contract with respect to that person. In the past, marine terminal operators established and filed tariffs with the FMC for their services pursuant to FMC regulations. This new provision is necessary to ensure that the operators of essential marine terminal

[7] 46 CFR § 514.1(c)(3)(i)(A) (October 1, 1998). Requiring marine terminals to file tariffs with the Commission, prior to OSRA, was derived from Section 10 of the 1984 Act.

[8] Senate Report 105-61, 105th, 1st Session (July 31, 1997), at 24.

[9] *Id.*; 46 CFR § 525.2(a)(3).

[10] Senate Report at 24.

> transportation facilities are promptly and fairly compensated for the services they provide to waterborne commerce.
>
> The Act provides:
>
> MARINE TERMINAL OPERATOR SCHEDULES-A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions. 40501(f)

The Commission's regulations implement the congressional mandate and purposes:

> A marine terminal operator, at its discretion, may make available to the public, subject to section 10(d) of the Act (46 U.S.C. 41102(c), 41103, 41106), a schedule of its rates, regulations, and practices.
>
> Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule.
>
> If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.
>
> 46 CFR §525.2(a), (a)(2) and (a)(3).

The Port cannot charge vessel operators by Tariff when it provides no service. It is trying to do by subterfuge what its Tariff does not authorize, and applicable law and regulations prohibit — invoicing the CFC to the vessel operators by name (as sample Port CFC invoices attached clearly show) - but passing the invoices through MTOs acting as billing or collection agents. The inapplicability of the CFC to the non-"user" carriers, combined with the inapplicability of the Tariff to vessel operations at leased terminals, plus the statutory/regulation prohibition, all render the entirety of Section H violative of the Act as an unreasonable practice employed by the Port to collect the CFC.

D. No Port Services Are Rendered to Vessel Operators to be Subjects of the Two-Step Test of Section 41102(c)

The Supreme Court Test

Volkswagenwerk is the leading case that in 1968 established the test for measuring violation of 46 U.S.C. § 41102(c), formerly section 17 of the Shipping Act of 1984.[11] *Volkswagenwerk* rejected as "far too blunt an instrument" a Commission test of "substantial benefit." The Court recognized "it may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under section 17, even though not all members of the group receive equal benefits." *Id* at 281. This does not apply to the CFC. The CFC is not levied on all groups which enjoy the purported benefits the Port envisions. It is only levied on vessel operators, benefits to whom are neither quantifiable nor reliable.

The Court instructed that receipt of a "substantial benefit" is not the question – "The proper inquiry under section 17 is, in a word, whether the charge levied is reasonably related to the service rendered." (Emphasis supplied.) *Id.* at 282. Because the Port renders no actual services to vessels, and benefits are theoretical, not empirical, there is nothing to put under a microscope. This frustrates any analysis under the *Volkswagenwerk* test. The *Volkswagenwerk* Court noted with approval the FMC approach in an earlier case where the Commission looked beyond "substantial benefits" to the "relationship between the service and the charge." (Id., fn. 33). (Emphasis added.)

West Gulf Maritime

The Maritime Commission followed *Volkswagenwerk* in *West Gulf Maritime Association* (18 SRR 783, 1978) in which it held: "The level of a charge must also be reasonably related to an actual service performed or a benefit conferred on the person charged." (Citing *Volkswagenwerk*). 18 SRR at 790, fn 14.

[11] *Volkswagenwerk Aktiengesellschaft v Fed. Mar Comm'n*, 390 U.S. 261 (1968)(assessment for fund to mitigate the labor effect of technology held to be unreasonable).

Baton Rouge

The *Volkswagenwerk* standard dominated a decade-long dispute over charges by Cargill, operator of a grain elevator under lease with the Port of Baton Rouge. It went to the D.C. Circuit via the ALJ and the Commission twice, culminating in a 1981 D.C. Circuit decision. Throughout the saga, the D.C. Circuit and the Commission held to the principle that under section 17, a marine terminal operator's charge must be "reasonably related to services rendered."[12]

The Port cannot argue that vessel operators are the only recipients of whatever benefits come from the rail facility, infrastructure improvements, or security enhancements – things that seem to be on the Port's mind when it rakes in the CFC proceeds. The 1975 Commission decision in the *Baton Rouge* dispute picked apart and disapproved, under section 17, the terminal's allocation of benefits to stevedores as a foundation for the charge to those stevedores. The Commission found the total cost for on-dock facilities could not be attributed solely to stevedores.[13] The D.C. Circuit confirmed the Commission decision, including the Commission remand for a further determination of a benefits formula.[14] The dispute then wended its way back to the D.C. Circuit, on appeal from the Commission's favorable finding.

In 1981, the D. C. Circuit dissected the Commission decision determining the benefits to stevedores from the MTO's per ton charge on grain handled, and the reasonableness of the MTO's charge. The *Volkswagenwerk* comparative analysis of relative benefits, "to determine whether a "reasonable relation to benefits derived" from "services and facilities," was on display in *Baton Rouge*. It is a complex technical exercise.

[12] *Baton Rouge Marine Contractors, Inc v. Federal Maritime Comm'n*, 655 F.2d 1210 (D.C. Cir. 1981).
[13] *Baton Rouge Marine Contractors, Inc v. Cargill, Inc.* 18 FMC 140 (1975).
[14] *Cargill Inc. v Federal Maritime Comm'n*, 530 F.2d 1062 (D.C. Cir. 1976)

At issue in *Baton Rouge* was the benefit to stevedores of the MTO's facilities, in particular an "automated shipping gallery" for loading grains. The charge was actually a user fee for using the MTO's facility, which triggered the voyage into the minutiae of benefits. The D. C. Circuit approved the methodology employed in the Commission's two-step analysis of the Cargill charge: The FMC "having concluded that stevedores derive substantial benefits from the use of Cargill's services and facilities, the FMC proceeded to determine whether the charge of ten cents per ton is unjust or reasonable under §17." 655 F.2d 1210 at 1214. However, the Court failed the Commission's effort both on the "attribution of benefits to stevedores from the Cargill facility," and on the reasonableness of the charge. *Id.* at 1216-17. The Port here, in dropping the CRF rail user fee, severed any connection between benefits to vessel operators and Port charges like the CFC.

The *Baton Rouge* court held the Commission departed from *Volkswagenwerk*'s teaching:

> There, the Supreme Court held that the FMC may not sustain a charge against a sec. 17 attack merely because the challenger derives "some substantial benefit: from the party imposing the charge. *Id.* at 282, 88 S.Ct, at 940-41. Rather, the correlation of that benefit to the charges imposed (must be) reasonable." *Id.* In particular, if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under section 17. 88 S.Ct. at 940.

Id. at 1217. Here, there being no Port facility used, except the public berths which already charge wharfage, and no other group charged, the "reasonableness" exercise is over before it begins. The Port could initiate a "security fee" for security, which would have to survive the *Volkswagenwerk/Baton Rouge* dissection; or, the Port could try an "infrastructure fee." But, the CFC cannot be dropped wholly on the shoulders of vessel operators who do not feel discernible impact any different from that of lessee terminals or cargo interests. Vessels are not the targeted beneficiaries of any Port service or facility other than public berthing, much less anonymous expenditures of CFC proceeds. If the service does not target the group, neither can the fee.

Dreyfus

The 49 page Initial Decision in *Dreyfus v. Plaquemines*, 25 FMC 73, 21 SRR 219 (1981) (Adopted by the Commission, 25 FMC 59 (1982)) is a prime example of the analysis of the services furnished in relation to a tonnage charge under Section 17 of the 1916 Act. The tonnage charge was enforced by criminal penalties and blacklisting, which the Hearing Examiner found extreme under section 17. 21 SRR at 238, 268. The Examiner also found a section 17 violation in that the Tariff's contradictory terms were ambiguous, 21 SRR at 268, noting that a tariff is construed against its issuer. 21 SRR at 261.

The Examiner noted that, as here, when Plaquemines adopted the charge, it had no "evidence of the actual costs of the service to be defrayed or recompensed." 21 SRR at 241. The Examiner concluded Plaquemines violated section 17 "because it has not been shown that the said fees are reasonably related to the services performed by Plaquemines Port and...Complainants have been subjected to charges which are not reasonably related to any services performed in their behalf by Plaquemines Port." 21 SRR at 268.

The ALJ's decision in the *Dreyfus* case held that the practice of a port authority assessing cargo-based fees on vessels calling at private terminals constituted unlawful double-charging of wharfage:

> The fee embodied in Item 145 of the tariff is denominated as a "Supplemental Harbor Fee" but in fact it is a fee assessed solely against cargo. It is in the nature of a wharfage fee. . . . The Supplemental Harbor Fee operates as a wharfage fee for the use of private facilities which in addition themselves charge wharfage or fees which are in lieu of wharfage. . . . The charging of wharfage by Plaquemines Port for the use of private facilities when the private facilities also charge wharfage is an unreasonable and unlawful practice contrary to section 17 of the Act. This practice is assuredly unlawful inasmuch as the charges assessed clearly are not reasonably related to the services provided.

Dreyfus, 25 FMC at 24.

Here we have an identical scheme: Respondent is imposing an additional fee on cargo loaded and unloaded, effectively a secondary, duplicative terminal charge, but providing no services in return.

In *Dreyfus*, the Examiner and Commission separately held that the Port fee violated section 17 for being ambiguous on its face. The Port's Tariff fails for this same reason. The CFC tariff is vague and ambiguous, creating a tax on vessels without admitting it. As applied, the Port strains the language of the Tariff in ways both overinclusive (roping in "users" that use no port services) and underinclusive (reading "cargo handling" to mean only to services to vessels, and not to motor carriers or cargo interests who benefit). Respondents try to run a "bait and switch" by calling the CFC a cargo charge, but charging the vessel. The ambiguous tariff on its face is an unreasonable practice.[15]

Per the Examiner, Plaquemines argued that, under *Volkswagenwerk*, and section 17, there was "a reasonable approximation between the benefits which Plaquemines provides and the charges which it uses in coordination of those benefits, whereas the complainants argue that these benefits and charges are not reasonably related." 21 SRR at 266. The Examiner found "the fees imposed by respondent have been anything but fair, and....have not been imposed in a reasonable and evenhanded manner." *Id.* The same is precisely true of the CFC, imposed on one group for transiting the Port, with no link to services provided to that group.

Flanagan

Most recently, in *Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist* , 27 S.R.R. 1123, 1132 (F.M.C. 1997) the Commission held:

> In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and

[15] *Dreyfus*, 25 FMC 59, 69 (1982)(ambiguous port fee provision which obscured the rights of the charged parties held unreasonable)

reasonable, to first determine for whom the service is performed." The *Boston Shipping Ass'n, Inc. v. Port of Boston*, 10 F.M.C. 409, 415 (1967) ("*Boston Shipping*")(emphasis added). Furthermore, "[a] just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service." [citation omitted] *West Gulf Maritime Ass'n v. Port of Houston Authority*, 21 F.M.C. 244, 248 (1978)(emphasis added). Thus, the inquiry here is whether Flanagan is a user of, and consequently enjoys a benefit from, the supplemental rail switching, and if so, whether the switching charge is reasonably related to that benefit.

There are Commission cases which have examined charges similar to the supplemental switching charge. *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 13 S.R.R. 422 (I.D. 1972), addressed, among other issues, a situation in which a port attempted to charge stevedores for the use of a "shipping gallery," a mechanized conveyor system which transported grain from the grain elevator to the vessel.

* * *

This case is analogous to the present proceeding, as one can view the shipping gallery as serving a similar purpose to the disputed rail car switching. In both instances, stevedores are targeted for charges for a service necessary for the orderly flow of cargo but not performed primarily for the stevedores' benefit.

* * *

In *Philippine Merchants Steamship Co., Inc v. Cargill*, Inc., 9 F.M.C. 155, 166 (1965), the Commission held that where custom indicates that weighing costs are to be borne by the cargo interest, those costs may not be imposed on the vessel, which benefits from the weighing only to the extent that such weighing is necessary for a determination of the proper freight rate. Thus, the weighing assisted in the general flow of cargo, but conferred no particular benefit on the vessel. The Commission's holding demonstrates its concern with allocating expenses to the proper party, and preventing the improper allocation of expenses to parties which do not enjoy a specific benefit from the services at issue.

* * *

LCS and the Port argue that Flanagan nevertheless benefits from the switching, since without switching, there would be no cargo for Flanagan to stevedore; they also argue that switching places the cargo closer to the vessel, allowing for easier stevedoring by Flanagan. These arguments are not compelling. The benefits that are alleged to flow to Flanagan are very general in nature, and are the sort of benefits that accrue from the business as a whole. Under LCS' and the Port's rationale, one could assign to stevedores benefits from nearly anything that assists the general flow of cargo to the Port. Such an allocation of benefits and expenses is not consistent with Commission case law. Shippers are billed for the preliminary switching and the unloading, so to charge stevedores for the process that occurs between these two is unreasonable. Under the *Volkswagenwerk* test and Commission precedent, a substantial, correctly allocable benefit from rail switching has not been shown to flow to the stevedore; absent such a benefit, no charge can be reasonable. The Commission therefore holds that imposing rail switching charges on stevedores is an unreasonable practice under section 10(d) (1) of the Act.

These Commission's observations in *Flanagan* fit the claimed CFC benefits from the CFC like a glove.[16]

IV. RELIEF REQUESTED

Complainants, ocean common carriers, seek relief from, and redress for, actions of the Port that have violated, and continue to violate, the Shipping Act, 46 U.S.C. § 41102(c). Complainants seek a cease and desist order, plus reparations, interest and attorneys' fees from the Port, based on the Port's adoption and implementation of its published Tariff provisions by which it has violated the 46 U.S.C. § 41102 (c) requirement that it establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Complainants request an order declaring unlawful Respondent's Tariff rules regarding the CFC, imposing a cease and desist order against implementation or collection of Respondent's CFC or any similar charge for which a service is not rendered by Respondent to the payer in return for the charge, and the interference with any vessel

[16] The fact that the Port's CFC is an impermissible tax masquerading as a fee is further supported by the Supreme Court's reasoning applying the Tonnage Clause of the U S. Constitution. Art I, Sec. 10 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage"). While a user fee for specific services rendered by the government is permissible, the "prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n, 296 U.S. 261, 265–266 (1935)(approving fee for bona fide policing services). If a charge, like the CFC, "is intended to raise revenue in a general way, with nothing specifically provided in return" to those paying the charge, it is a tax, but "if the payor receives something specific in return, and the amount of the charge is reasonably related to the value of that something, the charge is a user fee and cannot be a duty of tonnage." See Erik M. Jensen, "Quirky Constitutional Provisions Matter· The Tonnage Clause, Polar Tankers, and State Taxation of Commerce," 18 Geo Mason L. Rev. 669, 703 (2011), ww.georgemasonlawreview.org/doc/18_3-Jensen.pdf. See also Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. 1, 10 (2009) (Invalidating tax on vessels under the Tonnage Clause because it was "designed to raise revenue used for general municipal services."); State Tonnage Tax Cases, 79 U.S. (12 Wall) 204, 220 (1870) ("Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the shipowners"), Bridgeport & Port Jefferson Steamboat Co v Bridgeport Port Auth., 567 F.3d 79, 81 (2d Cir 2009), cert. denied, 130 S. Ct. 1075 (2010) (fee imposed by a port authority on ferry passengers violated Commerce and Tonnage Clauses because it was intended to raise general revenues and was unrelated in amount to the value of services provided by the port to those passengers).

or its operation based on non-payment of the CFC or such other charge, and awarding reparations, interest and attorney's fees to Complainants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Complainants' Motion for Judgment That Respondent's Cargo Facility Charge Violates 46 U.S.C. § 41102(c), Statement of Facts Not in Dispute and Exhibits to be served this 6th day of December, 2012, via overnight mail, upon the following:

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